87-2053

NO. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LIBERTY LOBBY, INC.,

Petitioner,

—against—

DOW JONES & CO., INC.
and RICH JAROSLOVSKY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Was the Due Process Clause of the Fourteenth Amendment violated when a judge of the United States Court of Appeals for the District of Columbia declined to recuse himself from participation in that court's consideration of this case?

2. Was the Due Process Clause of the Fourteenth Amendment violated when the United States Court of Appeals for the District of Columbia ruled that the District Court judge need not have recused himself and need not have referred the matter of his recusal to another judge when his own bias was questioned?

THE PARTIES

This statement is submitted pursuant to Rule 28.1 of this Court. Liberty Lobby, Inc. is a not-for-profit District of Columbia corporation. It is affiliated with Cordite Fidelity Corporation, a District of Columbia corporation and Cordite Fidelity, Inc., a Delaware corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Petitioner Liberty Lobby, Inc. respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on February 5, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals was decided on February 5, 1988, No. 86-7017. The opinion of the district court is reported at 638 F.Supp. 1149 (D.D.C. 1986).

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1988. Petitioners timely filed a petition for rehearing and suggestion for rehearing *en banc* with the Court of Appeals. The petition was denied on March 18, 1988. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of *certiorari* pursuant to 28 U.S.C. Section 1254(1) (1987).

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. Section 144 provides in pertinent part:

Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

Title 28 U.S.C. Section 455 provides in pertinent part:

Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice con-

cerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

STATEMENT OF THE CASE

This petition arises from a decision of the United States Court of Appeals affirming the District Court's grant of summary judgment dismissing a libel action brought by Liberty Lobby, Inc., a not-for-profit corporation. The basis for jurisdiction in the federal court was diversity of citizenship (28 U.S.C. Section 1332 (1982)).

On September 28, 1984, *The Wall Street Journal*, owned by the defendant Dow Jones & Co., Inc. published an article for the apparent purpose of discrediting President Reagan, which asserted that a "racial purist," associated in some fashion with President Reagan, was also associated with Liberty Lobby, Inc. *The Wall Street Journal* stated that the writings of Roger Pearson, the "racial purist," had "appeared in *Western Destiny*, a magazine published by the far right, anti-Semitic Liberty Lobby" and that Mr. Pearson "wrote several books on race and eugenics that were issued by Liberty Lobby's publishing arm" and which "are still sold by the National Socialist White People's Party, the Arlington, Va. based American Nazi group." Each allegation connecting Mr. Pearson to Liberty Lobby was untrue. Liberty Lobby did not publish *Western Destiny*. No books on race and eugenics or any other subject which were written by Mr. Pearson were ever published by Liberty Lobby. No books, magazines or pamphlets issued by Liberty Lobby are or were sold by the National Socialist White People's Party. During discovery the defendants, Dow Jones & Co. Inc., *et al.*, hereinafter Dow Jones, admitted that Liberty Lobby, Inc. had not published Mr. Pearson's works and asserted instead that Mr. Willis Carto, the treasurer of Liberty Lobby, had in their view, influenced or controlled the actions of

another entity which was responsible for some but not all of the alleged publications. Liberty Lobby Inc. denied this allegation as well.

During October 1985, Liberty Lobby, Inc. was the defendant in a lawsuit tried in the U.S. District Court for the District of Columbia, in which National Review, Inc. was the plaintiff. Counsel for National Review, Inc. contacted Mrs. Suzanne Garment, a writer for *The Wall Street Journal* and the wife of Leonard Garment, Esq., a public supporter and associate of National Review, Inc. At the initiation and request of counsel for National Review, Inc., Mrs. Garment agreed to write an article in support of National Review, Inc. and condemning and ridiculing Liberty Lobby, Inc. Mrs. Garment interviewed those associated with National Review, Inc., declined to speak with those associated with Liberty Lobby, Inc., was present in court only for the opening statements of counsel and secured all other information about the matter from counsel and others associated with National Review, Inc. and from her husband Leonard Garment, Esq.

On October 11, 1985, *The Wall Street Journal* published an article by Mrs. Garment in which the defamatory allegations about Liberty Lobby, Inc. published by Dow Jones on September 28, 1984, were repeated. Mrs. Garment did not write the portion of the article appearing under her byline which contained the republication of the defamation. Dow Jones refused to disclose the author of the republished libel asserting attorney-client privilege, which position the District Court sustained.

At the time Dow Jones republished its original defamation it apparently had already learned that its allegations were false and was developing a new position asserting that another entity published Mr. Pearson's works but that Mr. Carto was associated with both the other entity and Liberty Lobby, Inc.

Mrs. Garment, however, did compose a number of assertions about Liberty Lobby and its method of trying the case with National Review, Inc., all of which were untrue. Liberty Lobby, Inc. amended the complaint to include the causes of ac-

tion for defamation based upon the Garment article.

On February 28, 1986 at a hearing held before United States District Court Judge Thomas Penfield Jackson, counsel for Liberty Lobby, Inc., twice moved in open court for Judge Jackson to recuse himself due to his bias and prejudice against Liberty Lobby, Inc. and in favor of Dow Jones and due to the fact that Judge Jackson apparently had access to information in dispute in the case which information was not part of the record. At the hearing Judge Jackson stated that he had drawn conclusions about the deposition of Suzanne Garment after having access to "this entire deposition." However, the transcript of the deposition had not been filed, was not a record in the case and therefore access to that deposition must have been secured in a non-judicial and improper fashion. When counsel for Liberty Lobby, Inc. asserted that he "respectfully request[ed] the court to consider recusing itself in this matter," the court immediately denied the motion and stated that counsel could not be heard on the question.

On December 16, 1985 the defendants moved for summary judgment. On July 10, 1986 the District Court granted that dispositive motion. On September 25, 1986, having secured newly discovered information revealing the relationship between Judge Jackson and Leonard Garment, Esq., Liberty Lobby, Inc. filed a motion to disqualify Judge Jackson pursuant to Title 28 Sections 144 and 455 of the United States Code.

On August 7, 1986 Liberty Lobby, Inc. filed a Notice of Appeal with the United States Court of Appeals for the District of Columbia and subsequently filed a brief with the United States Court of Appeals for the District of Columbia.

On November 4, 1987 the Clerk's office for the U.S. Court of Appeals for the District of Columbia notified counsel in writing that the panel of judges which would hear the case would be comprised of Judges Robinson, Edwards and Parker. Neither party objected to that panel.

On November 19, 1987 the Clerk's office for the U.S. Court of Appeals informed counsel that Judge Robinson had

been removed from the panel and replaced by Judge Bork.

On December 3, 1987 the Clerk's office for the Court of Appeals called the office of counsel for Liberty Lobby to assert that one of the three judges on the panel had just submitted a book review to be published in *The Wall Street Journal* and that *The Wall Street Journal* would pay a small sum of money to the judge if the review was published. The Clerk's office, while refusing to disclose the name of the judge, inquired if Liberty Lobby, Inc. objected to the participation of that judge on the panel in this case. Counsel for Liberty Lobby, Inc. stated that there would be no objection based solely upon the proposed book review.

On December 7, 1987 the Clerk's office notified counsel that another panel had been chosen for this case and that it would be comprised of Judges Edwards, Bork and Williams.

On November 23, 1987 Liberty Lobby, Inc. moved to disqualify Judge Bork from participating on the panel due to his close and continuing personal relationship with Leonard and Suzanne Garment, including but not limited to the fact that Mr. and Mrs. Garment were the leaders of the campaign to secure the confirmation for Judge Bork of his nomination to the United States Supreme Court.

On December 7, 1987 Judge Bork denied Liberty Lobby's motion to disqualify him.

On February 5, 1988 Liberty Lobby filed a motion with the United States Court of Appeals to reconsider its application to disqualify Judge Bork asserting that although Judge Bork had given as a reason for refusing to recuse himself his intention to remain on the Court of Appeals, he had, on the very day that his opinion was published in this case, resigned from the Court of Appeals.

On February 5, 1988 the Court of Appeals affirmed the decision of the District Court in granting summary judgment in an opinion written by Judge Bork.

On February 19, 1988 Liberty Lobby, Inc. filed a petition for rehearing and suggestion for rehearing *en banc* with the

United States Court of Appeals.

On February 25, 1988 the United States Court of Appeals denied Liberty Lobby's Motion to Reconsider its Motion for Disqualification.

On March 10, 1988 Liberty Lobby moved the United States Court of Appeals to reconsider its application for disqualification of Judge Bork due to the misconduct and deception practiced by defendants and their attorneys. The defendants and their attorneys had falsely certified to the Court of Appeals that they had served upon Liberty Lobby, Inc. a copy of their opposition when in fact they had not done so until after the Court had ruled upon the motion. Dow Jones and its attorneys subsequently admitted that they had not served Liberty Lobby, Inc. with their opposition until after the Court of Appeals had ruled on the matter. This bizarre practice by counsel for Dow Jones denied to Liberty Lobby an opportunity to respond to the brief.

On March 18, 1988 the Court of Appeals denied the petition for rehearing and suggestion for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

1. Judge Bork and the Court of Appeals violated the Due Process Clause of the Fourteenth Amendment when they permitted Judge Bork to decline to recuse himself from participation in this case. The close and continuing personal and professional relationship between Judge Bork and two of the principles in this case mandated Judge Bork to recuse himself in that it was apparent that his impartiality might be reasonably questioned. This Court in *Aetna Life Ins. Co. v. Lavoie*, 106 S.Ct. 1580 (1986), citing *Ward v. Village of Monroeville*, 93 S.Ct. 80, 83 (1972), held that a judge should recuse himself when the "situation is one which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."

In *Aetna*, this Court citing *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623 (1955), held that,

> The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, justice must satisfy the appearance of justice."

The decision by Judge Bork and the ruling of the Court of Appeals stands in direct conflict with the teaching of this Court in *Aetna* and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Rule 17, United States Supreme Court Rules.

2. The District Court and the Court of Appeals violated the Due Process Clause of the Fourteenth Amendment when they ruled that the District Court judge need not have recused himself and need not have referred the matter of his recusal to another judge when his bias was questioned appropriately and in a timely fashion. Liberty Lobby, Inc. submitted a fact-specific affidavit which could lead a reasonable person to the conclusion that the District Court was biased in favor of Dow Jones and biased against Liberty Lobby, Inc. The District Court, upon examining the affidavit and finding it legally sufficient was obligated by the statute to act no further and to refer the matter to another judge. He was relieved "from the delicate and trying duty of deciding upon the question of his own disqualification" since the affidavit demonstrated that the bias stemmed from an extra-judicial source. *U.S. v. Berger*, 255 U.S. 22 (1921); *In Manoe Finance Co. v. Goo*, 781 F.2d 1370 (9th Cir. 1986). Disqualification under the circumstances was mandatory. *SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977).

ARGUMENT

I. THE REFUSAL OF JUDGE BORK TO RECUSE HIMSELF AND THE ENDORSEMENT OF THAT DECISION BY THE UNITED STATES COURT OF APPEALS VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE UNAMBIGUOUS DECISION OF THIS COURT IN *AETNA LIFE INSURANCE V. LAVOIE*

The primary issue submitted to the Court of Appeals by Liberty Lobby, Inc. concerned the improper decision of the District Court which both refused to recuse itself and refused to refer the matter to another judge. Therefore, the decision by Judge Bork, apparently affirmed by the U.S. Court of Appeals, that he need not recuse himself, when his social and political relationship with central figures in the case was more intimate and continuous than was the relationship between the District Court and the same central figures in the case, was improper in view of Title 28 Section 455 of the United States Code and the teaching of this Court in *Aetna* and under the specific circumstances of this case was tantamount to a prejudgment of Liberty Lobby's primary argument. How could Judge Bork, who relied upon Mr. and Mrs. Garment to lead his campaign to become a member of the U.S. Supreme Court, who met with and consulted with them almost as he was deciding this case, who regularly played poker with Leonard Garment while he was deciding this case, who worked closely with Mr. Garment in the past and who resigned from the U.S. Court of Appeals to work with Mrs. Garment at the American Enterprise Institute and to serve as a "Commentator" for the *National Review* along with Mr. and Mrs. Garment, find that the District Court should have recused itself, for a relationship with Mr. and Mrs. Garment, when he, Judge Bork, refused to do so. All of these facts were set forth with accompanying documents when Liberty Lobby submitted its application to the U.S. Court of Appeals to recuse Judge Bork. (Motion, February 5, 1988)

Under the circumstances it is impossible for a reasonable person with knowledge of all of the facts to deny that the judge's impartiality might be reasonably questioned. 28 U.S.C. 455. *In re Manoe Finance Co. v. Goo,* 781 F.2d 1370, 1372-73 (9th Cir. 1986). The facts submitted to Judge Bork and the Court of Appeals in this case mandated judicial disqualification. *SCA Services, Inc. v. Morgan*, 557 F.2d 110, 112 (7th Cir. 1977).

Judge Bork temporarily retired from active service on the Court of Appeals while he and his public relations champion, Leonard Garment, Esq., aided by Suzanne Garment, carried on an unprecedented media campaign and composed and distributed to members of the U.S. Senate documents supporting Judge Bork's nomination. After that nomination was rejected, Judge Bork returned to service on the Court of Appeals apparently primarily to rule upon this case, although he had not been a member of the panel originally selected for this case. Clearly, there is an appearance, at the very least, that Judge Bork's conduct was partial. Recognized legal scholars questioned by the *Legal Times*, a law journal published in Washington, D.C., asserted that Judge Bork's participation was questionable. (*Legal Times*, December 14, 1987.) It cannot be asserted that a reasonable person could not reasonably question the impartiality of Judge Bork when, as we have seen, responsible law professors have done so.

Both Dow Jones, through its former employee, and present client, Suzanne Garment, and Judge Bork possessed all of the relevant information regarding the ongoing personal and professional relationship that Judge Bork shares with Mr. and Mrs. Garment. They were under a duty to disclose the relevant facts. The facts submitted to the Court of Appeals by Liberty Lobby, Inc. may not tell the entire picture of the close personal and professional relationship which exists between Judge Bork and the central figures in this case. Obviously, no discovery is available to Liberty Lobby, Inc. regarding this matter. For that reason Judge Bork and Dow Jones were obligated to be forthcoming

and in the absence of such action, as in this case, Judge Bork was particularly constrained to disqualify himself.

One of the reasons offered by Judge Bork in his memorandum in which he set forth the reasons why he would not recuse himself, is that many individuals took strong public positions for or against his confirmation and that he would be in the future "of greatly diminished usefulness to this Court" were he to establish a precedent by recusing himself in this case. (Memorandum Opinion, December 7, 1987, p. 3) This explanation however is flawed for two reasons. Leonard Garment and his wife were not two individuals who favored or opposed the confirmation; they led Judge Bork's campaign. Since it appears that Judge Bork had already decided to resign from the Court of Appeals when he wrote the opinion, in fact, the opinion was issued on Judge Bork's last day as a member of the court, it appears that Judge Bork's concerns about his usefulness to the Court in the future were offered disingenuously.

The gravamen of petitioner's concern is not just that Judge Bork had agreed to serve as a Commentator along with Leonard Garment and Suzanne Garment **before** he had written the opinion in this case, but that he had agreed to work for the *National Review* **before** he had written the opinion for the Court of Appeals in this case. The February 19, 1988 issue of *National Review* was distributed on February 2, 1988. The deadline for that issue occurred many days in advance of February 2. Thus during January 1988, the *National Review* wrote that Judge Bork, along with Suzanne Garment and Leonard Garment, would serve as a Commentator. That issue of the *National Review* published the cover design and photograph on its cover credited to Charles Bork, apparently the son of Judge Bork. A substantial portion of the complaint in this case was based upon an article written by Suzanne Garment, after consultation with her husband Leonard, regarding a lawsuit between Liberty Lobby, Inc. and the *National Review*. Mrs. Garment published an impassioned defense of the *National Review* and made entirely false statements about Liberty Lobby, Inc. in an article written

at the request of counsel for the *National Review*. It seems impossible to assert that the test set forth by this Court in *Aetna* and cited by various appellate courts thereafter, that in order "to perform its high function in the best way, justice must satisfy the appearance of justice," 106 S.Ct. at 1587 cited by *Matter of Yagman*, 796 F.2d 1165, 1178 (9th Cir. 1986) has been met by Judge Bork in this case.

In his opinion Judge Bork held that reliance upon an article published in the *National Review* was appropriate. (Opinion, February 5, 1988, p. 20). In addition, Judge Bork held that Suzanne Garment's discussion of the *National Review* trial was protected. Central to Judge Bork's reasoning throughout the opinion which he wrote for the Court of Appeals was his evaluation of the credibility of the *National Review* and the prerogatives of Suzanne Garment. Judge Bork, however had failed to disclose that his son had an apparent financial interest in the *National Review* and that he, Judge Bork, had already agreed to be united with Suzanne Garment and Leonard Garment as Commentators employed by the *National Review* before he passed upon the issues in this case which impacted directly upon Suzanne Garment, Leonard Garment and the *National Review*.

In addition, it appears that Judge Bork was less than candid when he published his memorandum opinion denying the motion for disqualification. Judge Bork asserted only that he served in the same administration with Leonard Garment in the past and that "we meet occasionally at social functions." (Memorandum Opinion, December 7, 1987, p. 4) While Judge Bork stated that Mr. Garment "played no role in my preparation for the hearings **or in any of my subsequent activities connected with the confirmation process**" (*Id.*, p. 4), Mr. Garment tells the story very differently. He told the *New York Times* that he and his son Paul visited the Borks on the eve of the Judge's scheduled meeting with President Reagan. Mr. Garment urged the Judge to carry on the fight and Judge Bork took the matter under advisement. Two days later, according to Garment, when Judge Bork announced that the fight would go on, "I called

him and said 'God Bless you.' " Mr. Garment added "I'm going to help you." Shortly thereafter Suzanne Garment and Leonard Garment wrote and circulated petitions denouncing the politicization of the Bork debate and in one week Garment worked with fifteen volunteer lawyers to produce ten briefs attacking sections of the Judiciary Committee Reports, according to *New York Times*, October 26, 1987.

On October 20, 1987 the *New York Times* described Leonard Garment as "a Washington Lawyer who has been advising Judge Bork." Six days later the *New York Times* reported that Leonard Garment and Judge Bork "consulted frequently" regarding Garment's campaign to aid his friend's effort to secure confirmation. In addition, the *New York Times* reported that Judge Bork, described as Mr. Garment's "longtime friend," authorized Mr. Garment to issue at least one statement on his behalf. (*New York Times*, October 26, 1987.)

When there were rumors that Judge Bork would ask that his nomination be withdrawn, Mr. Garment obtained Judge Bork's permission to deny the rumors on his behalf, the *New York Times* asserted. The *New York Times* also reported that its source was Leonard Garment.

On that same day, Suzanne Garment and Leonard Garment drafted a full page advertisement in support of Judge Bork's nomination which they caused to be published in the *Washington Post* under the headline "This Time They've Gone Too Far." Suzanne Garment and Leonard Garment paid $35,000 for the advertisement. (*New York Times*, October 26, 1987.)

While the feverish activity by Suzanne and Leonard Garment on behalf of Judge Bork took place, Suzanne Garment's reputation as a journalist was very much in doubt due to her entirely inaccurate article which had been published in *The Wall Street Journal* and which was a basis for the lawsuit in this case. Following the substantial investment of money, time and effort by Suzanne and Leonard Garment in support of Judge Bork's confirmation effort, Judge Bork became a member of a panel,

although three other judges had previously been chosen, to pass upon the writing of Suzanne Garment and the credibility of the *National Review*. Judge Bork, who had before he wrote the opinion, already agreed to work with Suzanne and Leonard Garment for the *National Review* and to work with Suzanne Garment at the American Enterprise Institute, refused to disqualify himself asserting that his relationship with the Garments was casual. He then vindicated Suzanne Garment's reputation and held the *National Review* to be a credible source.

Liberty Lobby, Inc. does not contend that it is entitled to a friend in court. It does contend that it is entitled to an impartial determination of its claims and that Judge Bork's intrusion into this case and insistence that he remain in the case creates at the very least an appearance of impropriety in view of his relationship with Leonard Garment, Suzanne Garment and the *National Review*.

II. THE DISTRICT COURT JUDGE AND THE COURT OF APPEALS VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHEN THEY RULED THAT THE DISTRICT COURT JUDGE NEED NOT HAVE RECUSED HIMSELF AND NEED NOT HAVE REFERRED THE MATTER OF HIS RECUSAL TO ANOTHER JUDGE WHEN HIS BIAS STEMMED FROM AN EXTRA-JUDICIAL SOURCE AND HIS IMPARTIALITY WAS REASONABLY QUESTIONED

At a hearing held before the United States District Court Judge, Thomas Penfield Jackson, counsel for Liberty Lobby, Inc. moved on two separate occasions for the Court to recuse itself due to the apparent bias and prejudice demonstrated by the Court against Liberty Lobby, Inc. and for Dow Jones. Most striking was the very firm assertion made by the District Court that he reached fixed conclusions in the case since he had access to "this entire deposition" referring unequivocally to the

deposition of Suzanne Garment. While Liberty Lobby, Inc. respectfully asserts that the judge's conclusions were entirely inaccurate, it states without equivocation that since the transcript of the deposition had not been filed, and was not a record in the case, it had not been available to the District Court through judicial and proper methods. When counsel asserted that he "respectfully request[ed] the court to consider recusing himself in this matter," the court immediately denied the motion and denied counsel for Liberty Lobby, Inc. an opportunity to be heard on the matter. Thereafter the District Court granted the motion for summary judgment filed by Dow Jones.

On September 25, 1986 Liberty Lobby, Inc. filed a motion to disqualify Judge Jackson pursuant to Title 28 Sections 144 and 455 of the United States Code. In that motion which was accompanied by various exhibits and an affidavit by Mr. Carto, Liberty Lobby, Inc. established that Leonard Garment had been counsel for President Nixon and had succeeded John Dean in that capacity when Mr. Dean was dismissed during the Watergate scandal. The *New York Times* reported that Leonard Garment had suggested that John Mitchell would make an excellent campaign manager for Mr. Nixon. Mr. Garment's primary function as the new special counsel to President Nixon was to manage the situation resulting from the Watergate scandal including seven federal indictments for participating in conspiracy to cover up the facts. One of Mr. Garment's primary responsibilities apparently was related to the indictment of seven persons for the conspiracy referred to above. Another was the lawsuit filed against the Committee for the Reelection of the President. In both of those matters Thomas Penfield Jackson, Esq. appears to have had an involvement. One of the persons indicted was Kenneth Wells Parkinson, Esq., Mr. Jackson's law partner. Mr. Jackson also served as counsel for President Nixon's Finance Committee to Reelect the President. In addition, Mr. Jackson was counsel for Mr. Mitchell. Mr. Parkinson also served as attorney for the Committee to Reelect the President. Liberty Lobby, Inc. submitted to Judge Jackson, in its motion

to disqualify him, an affidavit which offered information to the effect that Mr. Mitchell had allegedly stated that it was useful to discredit Liberty Lobby, Inc. because that organization had been a thorn in the side of the administration.

A reasonable person examining the record referred to would be constrained to conclude that Mr. Garment and Judge Jackson had previously maintained a close and continuing professional relationship and that Mr. Jackson represented Mr. Mitchell who, it is asserted, approved of an effort to discredit Liberty Lobby.

At the outset when the complaint in this case focused entirely upon the original defamation complained of and before it was amended to include the defamatory article written by Suzanne Garment, Judge Jackson's conduct was appropriate. Neither party found fault with the court's rulings or statements. However, after Liberty Lobby, Inc. amended the complaint to include the defamatory passages written by Suzanne Garment, Judge Jackson's conduct dramatically changed. He was abusive to counsel for Liberty Lobby, Inc., made statements that were both untrue and unsupported by the record, and asserted that he had read the entire Garment deposition. Further, Judge Jackson improperly warned counsel for Liberty Lobby not to file a lawsuit in a related case. He asserted "and I would act with a good deal of circumspection before you do that." (Hearing Transcript, February 27, 1986, p. 19) "Circumspection" is a warning which puts a party on notice that he should be concerned about adverse possible consequences.

Neither Liberty Lobby, Inc. nor its counsel provided a copy of the Garment deposition to Judge Jackson who stated that his rulings denying Liberty Lobby's motion to compel answers to questions was based upon his reading of the entire deposition. Since the transcript of the Garment deposition had not been filed and was not part of the court record there is an appearance that Judge Jackson had access to that deposition in an extra-judicial fashion. A reasonable person might reasonably question, in view of Judge Jackson's relationship with Mr. Gar-

ment, the source of information about the deposition.

It was only Judge Jackson's dramatically altered conduct, commencing after the Garment article became a factor in the case, that caused Liberty Lobby, Inc., for the first time, to probe the relationship between Judge Jackson and Leonard Garment.

While the District Court refused to recuse itself and thereafter granted Dow Jones' motion for summary judgment, it cannot be said that the Court did so based upon an examination of the record. The District Court, relying upon a record it could not have seen properly, denied Liberty Lobby, Inc. an opportunity to conduct further discovery, to ask further questions and refused to compel Mrs. Garment to answer those questions which she had wrongfully refused to answer. The District Court then refused to permit counsel for Liberty Lobby, Inc. to state the basis for the recusal motion.

> The single most important concern in these situations, as in every case, is ensuring that all parties are afforded a fair and complete opportunity to present their evidence and arguments.
>
> *Matter of Yagman*, 796 F.2d 1165 (9th Cir. 1986)

The affidavit and motion submitted by Liberty Lobby to disqualify Judge Jackson was timely and legally sufficient. See *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *United States v. Azhocar,* 581 F.2d 735, 738-40 (9th Cir. 1978); *cert denied*, 440 U.S. 907, 99 S.Ct. 1213 (1979); *United States v. Bennett*, 539 F.2d 45, 51 (10th Cir.), *cert denied* 429 U.S. 925, 97 S.Ct. 327 (1976). If the judge to whom a timely motion is directed determines that the accompanying affidavit specifically alleges facts stating grounds for recusal under Section 144, the legal sufficiency of the affidavit has been established, and the motion must be referred to another judge for determination on its merits. *Azhocar*, 581 F.2d at 738. This the District Court refused to do.

A motion properly brought pursuant to Section 144 will raise a question concerning recusal under Section 455(b)(1) as well as Section 144. *U.S. v. Sibla*, 624 F.2d 864 (9th Cir. 1980). In *Sibla* the court asserted that Section (b)(1) simply provides a specific example of a situation in which a judge's "impartiality might reasonably be questioned" pursuant to Section 455(1). *U.S. v. Olander*, 584 F.2d 876, 882 (9th Cir. 1978). In *Sibla* the court held that if the affidavit is sufficient on its face, the motion must be referred to another judge for a determination of its merits under Section 144. *Sibla* 624 F.2d at p. 868.

The District Court here failed to recuse itself or refer the case to another judge for consideration. Judge Bork, writing for the Court of Appeals, found no fault with the actions of the District Court.

This Court in *Aetna* citing *Murchison*, 349 U.S. 136, 75 S.Ct. 625, asserted that:

> The Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its highest function in the best way, justice must satisfy the appearance of justice.

As we have seen, the Court of Appeals was sufficiently sensitive to these concerns so that it inquired of counsel whether or not there would be an objection made to participation in the panel of a judge who enjoyed the most minor financial relationship with *The Wall Street Journal* in reference to the proposed publication of a book review. In another case, *Liberty Lobby, Inc. v. John Rees, et al.*, U.S. Court of Appeals for the District of Columbia No. 86-7091, Judge James Buckley inquired of counsel as to whether there would be any objection to his participation in the panel since an issue tangentially could be said to be related to an article published by the *National Review* with which Judge Buckley's brother is associated. Judge Buckley properly declined to participate in the case. In both of these instances the judges themselves made full disclosure in an un-

solicited and gracious manner and made plain their willingness to accept the judgment of counsel regarding an appearance of impartiality. Given this history Judge Bork's intrusion into the cause, insistence upon participating in the case in spite of a motion for disqualification, together with his ongoing close, personal, political and professional relationship with two of the central figures in this case, appears to be an aberration.

In the instant matter, a judge whose conduct in the courtroom and whose reliance upon a document which apparently he examined outside of the courtroom, and who behaved in a dramatically hostile fashion toward Liberty Lobby, Inc. and its counsel and in a dramatically and improperly protective fashion towards Suzanne Garment, refused to recuse himself and refused to refer the question of his disqualification to another judge. Judge Bork, who likely had a closer and more intimate relationship with Mr. and Mrs. Garment then entered the lists as a member of a panel to consider this case although he had not been selected originally on that panel. He denied Liberty Lobby's motion to disqualify him while he had apparently already agreed to serve with both Leonard and Suzanne Garment as a Commentator for the *National Review* and work with Suzanne Garment at another institution. Judge Bork, after finding no reason to question his own participation in the case, quite naturally concluded that the District Court was also correct in its actions. At the very least, neither has the appearance of justice been served nor have doubts about courts' impartiality been resolved.

CONCLUSION

For the foregoing reasons, this petition for writ of *certiorari* should be granted.

May 5, 1988

Respectfully submitted,

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